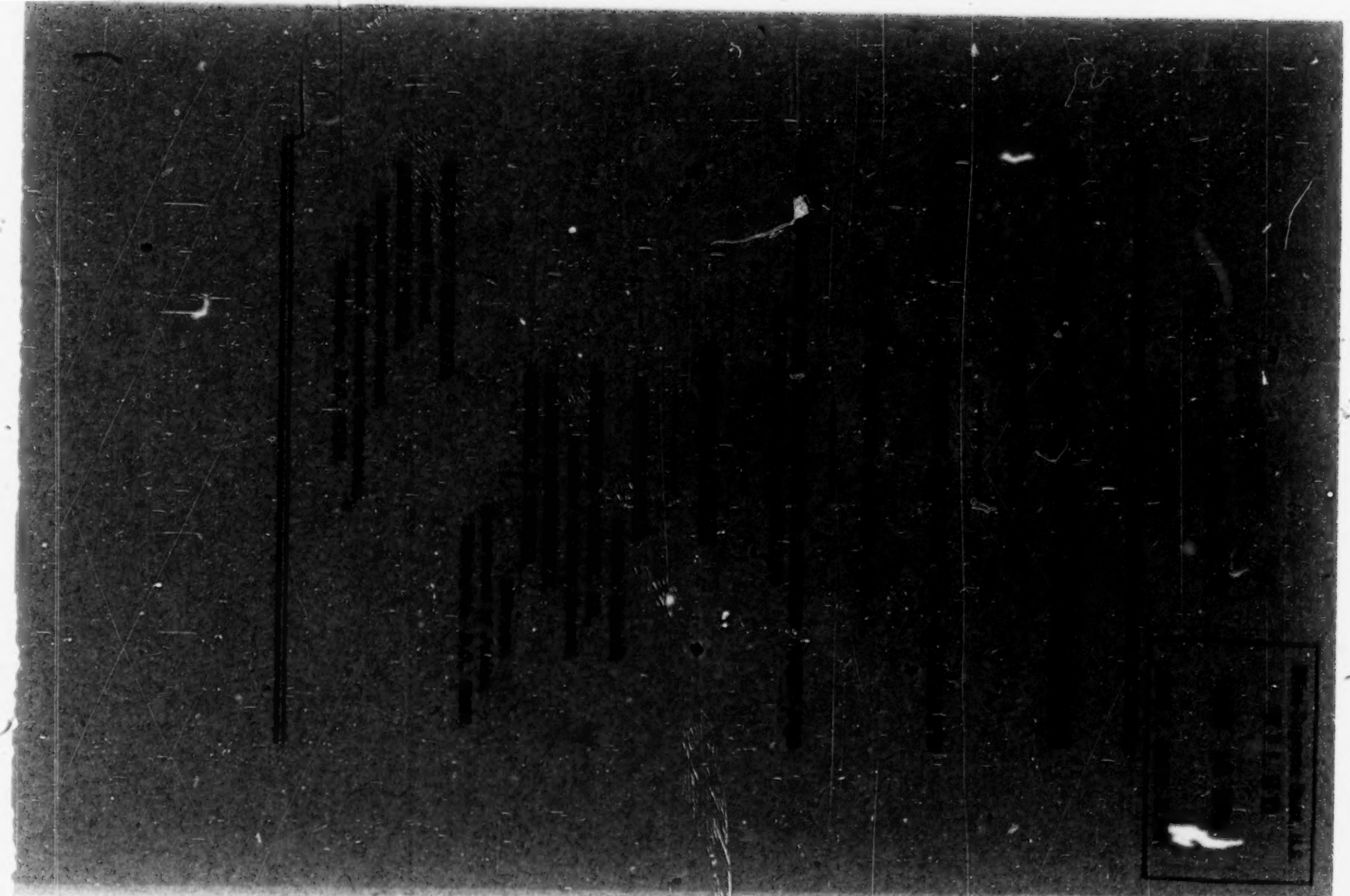

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1033

CURTIS, INC., AND MONFORT PACKING CO., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court, convened pursuant to 28 U.S.C. 2325, dismissing an action brought to set aside an order of the Interstate Commerce Commission. The order (a) granted appellant Curtis authority to extend its existing motor carrier operations so as to carry meat, meat products and meat byproducts between Greeley, Colorado, and seven eastern points,

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and (b) denied it authority to serve other destinations from Greeley.

In 1959 Curtis applied under Section 207(a) of the Interstate Commerce Act, 49 U.S.C.A. 307(a), for a certificate of public convenience and necessity authorizing it, through direct single-line motor vehicle service, to transport meat and other packinghouse products between Greeley, Colorado, and 151 points in 37 States and the District of Columbia. The application was supported by Capitol Packing Company ("Capitol") (the predecessor of appellant Monfort Packing Company). Capitol was constructing a large meat packing plant in Greeley, which Curtis proposed to serve. Capitol planned to ship 30–35 percent of the output of the Greeley plant by for-hire motor carrier, and most of the remainder by rail (J.S. 32, 60). The application was opposed by motor and rail carriers, all of whom provide transportation over some part of the route requested by Curtis, and by a railroad association. In combination, the existing motor carriers can provide service to 147 of the 151 points in question (J.S. 63).

The Commission's Division I, by order dated February 16, 1961, granted Curtis' application insofar as it sought to serve seven eastern points, and denied the remainder of the application on the ground that the existing carriers could adequately meet Capitol's need for service to the other points (J.S. 53–68). Upon reconsideration, another panel of Division I granted Curtis the entire authority requested (J.S. 69–75).

On further reconsideration the entire Commission (two members dissenting) reinstated the February 16

decision of Division 1 granting authority to serve only seven points. Ruling that all material matters of law and fact had been adequately dealt with in the February 16 report and order, the Commission "affirmed and adopted [that report] as our own" (J.S. 76–78).

The three-judge district court unanimously upheld the order (J.S. 25–40; 225 F. Supp. 894). The court held that "since the evidence in the record is ample to show that all of the destination points in controversy could be served with reasonably adequate speed and volume by the existing carriers, * * * the Commission did not err in holding that * * * Curtis failed to meet the demands of proof of convenience and necessity" (J.S. 37). The court further held that the Commission, in adopting the Division's report, did not violate Section 8(b) of the Administrative Procedure Act (J.S. 39).

ARGUMENT

This appeal presents no substantial question warranting plenary review by this Court. It involves only (1) the correctness of the Commission's factual determination, affirmed by the district court, that appellant Curtis had failed to show the need for all the service proposed; and (2) the form in which the Commission rendered its decision.

1. Appellant contends (J.S. 9–16) that the record fails to support the Commission's finding that existing motor carriers are capable of meeting the transportation needs of Capitol, the supporting shipper. The decision whether additional motor carrier service is necessary to serve the public convenience and neces-

sity is within the discretion of the Commission.' *Interstate Commerce Commission* v. *Parker,* 326 U.S. 60, 65. Plainly, as the district court held, the Commission did not abuse its discretion in the instant case.

It is not disputed that through interlining the existing motor carriers can provide service for Capitol from its Greeley plant to 147 of the 151 points for which Curtis requested authority (J.S. 32-33, 63). Nor is it disputed that Capitol has never in the past been seriously inconvenienced by using the service of existing carriers for shipment of its products from its plants in Denver to those points (J.S. 33). The record further shows that the protesting motor carriers which can serve those points have access to adequate equipment if they are required to supplement their existing large fleets of trucks; and that the intrastate carriers, which will carry shipments from Greeley to Denver and there interline with the interstate carriers, can also secure additional equipment (J.S. 34, 63). Both interstate and intrastate carriers are prepared to, and desirous of, performing the service for Capitol (J.S. 34, 63).[1]

Although Capitol has indicated that it would prefer a single-line direct route between Greeley and each of the points in question, it has also stated that it is willing to use existing facilities if such service satisfies its needs (J.S. 61–62). Moreover, as the Commission noted, where existing carriers in combination

[1] Appellants argue (J.S. 9–10) that proof of the willingness and ability of four of the protesting motor carriers to provide service to Capitol (see *e.g.*, R. 158–160) must be ignored because those carriers did not file exceptions to the hearing examiner's report. As the district court demonstrated (J.S. 34), this argument is without substance.

can provide adequate service, a shipper's preference for new single-carrier service does not determine whether public convenience and necessity requires such additional service (J.S. 61–63).

The burden is on the applicant to show that the public convenience and necessity require the proposed service, and a principal element in meeting this burden is proof of the inadequacy of existing facilities (*Hudson Transit Lines, Inc.* v. *United States,* 82 F. Supp. 153, 157 (S.D.N.Y.), affirmed, 338 U.S. 802). Interline service may be fully responsive to a shipper's needs, and the existence of such service is a sufficient basis for denying applications to provide new direct-line services. *Ayer* v. *United States,* 139 F. Supp. 440 (N.D. Ga.); *Colorado-Arizona-California Express* v. *United States,* 224 F. Supp. 894 (D. Colo.). The Commission was therefore fully justified in denying the requested authorization except for those destinations as to which Curtis had shown (J.S. 63–65) that existing service would be inadequate. As the court below pointed out, should the interlined service prove inadequate in any respect, Curtis may reapply for additional authority (J.S. 37).

2. Appellants argue (J.S. 16–22) that the entire Commission violated Section 8(b) of the Administrative Procedure Act, 5 U.S.C. 1007(b), because it adopted the initial report, findings and conclusions of Division 1 instead of making its own independent findings. This contention is frivolous. Section 8(b) requires all agency decisions to "include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law,

or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof." Appellants do not deny that the report of Division 1 which the Commission adopted satisfies the standards of Section 8(b). There was no need for the Commission to prepare an additional report restating or paraphrasing the Division's findings, conclusions and reasons. *T.S.C. Motor Freight Lines, Inc.* v. *United States,* 186 F. Supp. 777, 787 (S.D. Texas), affirmed, *sub nom. Herrin Transportation Co.* v. *United States,* 366 U.S. 419. As the court below correctly stated (J.S. 39), the Commission "adequately adopted a prior reasoned report which had set out a sufficient basis for the action taken. There was no necessity for further explanation as to the cause of the Commissioners' votes."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court should be affirmed.

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